UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM GALICIA, on behalf of himself and all others similarly situated, Plaintiff, -against- ICE CREAM HOUSE ON BEDFORD AVE LLC, ICE CREAM HOUSE, LLC, ICE CREAM HOUSE ON AVE M LLC, ICE CREAM HOUSE ON 36TH STREET LLC, REAL KOSHER ICE CREAM INC., DANIEL KLEIN, DAVID KLEIN, and AVIGDOR KLEIN, Defendants.	**REPORT AND RECOMMENDATION** 16-CV-6738 (CBA)(PK)

Peggy Kuo, United States Magistrate Judge:

Plaintiff William Galicia brought this putative collective and class action against Defendants Ice Cream House on Bedford Ave LLC; Ice Cream House, LLC; Ice Cream House on Ave M LLC; Ice Cream House on 36th Street LLC; Real Kosher Ice Cream Inc. (collectively, "Entity Defendants"); Daniel Klein; David Klein; and Avigdor Klein (collectively, "Individual Defendants," together with Entity Defendants, "Defendants") pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and the New York Labor Law ("NYLL") §§ 190 *et seq.* and 650 *et seq.* Plaintiff alleges that Defendants have violated the FLSA and NYLL by failing to pay overtime and spread-of-hours pay and to provide wage notices and statements. (*See* Second Amended Complaint ("SAC"), Dkt. 40.)

Before the Court on referral from the Honorable Carol Bagley Amon is Real Kosher Ice Cream Inc.'s Motion to Dismiss (the "Motion"). (*See* May 19, 2017 Order; August 4, 2017 Notice; Dkt. 42.) For the reasons stated herein, the undersigned respectfully recommends that the Motion be denied.

BACKGROUND[1]

Plaintiff worked for Defendants as a retail employee at various locations from May 2011 to October 2016. (SAC ¶¶ 23-24, 188-90.)

The Entity Defendants manufacture and sell kosher food products "including, but not limited to, ice cream, cakes, sorbets, desserts, paninis, and pasta." (*Id.* ¶ 2.) Ice Cream House on Bedford Ave LLC ("Bedford Ave"), Ice Cream House on Ave M LLC ("Ave M"), and Ice Cream House on 36th Street LLC ("36th Street") (collectively, the "Retailers") are retail locations, whereas Real Kosher Ice Cream Inc. ("RKIC") is a wholesaler and Ice Cream House, LLC ("Ice Cream House Manufacturing Plant") is a manufacturer. (*Id.* ¶ 33; September 14, 2017 Hr'g Tr. at 4, Dkt. 50.) Individual Defendants Daniel, David, and Avigdor Klein are "officers, owners, and operators of each of the Entity Defendants." (SAC ¶ 40.)

Plaintiff alleges that he worked at Bedford Ave from May 1, 2011 until December 24, 2014, and at Ice Cream House Manufacturing Plant for an undisclosed period of time, until his termination on October 31, 2016. (*Id.* ¶¶ 23-24, 42, 53, 190.) He regularly worked over 40 hours a week and over 10 hours a day, but Defendants failed to pay him overtime and spread-of-hours pay. (*Id.* ¶¶ 188-90, 197.) Defendants initially paid Plaintiff $10.00 an hour, increasing his wage rate over time to $16.00 per hour, but did not pay him an overtime rate or spread-of-hours pay for days on which he worked over 10 hours. (*Id.* ¶¶ 191-96, 198.) Defendants did not provide him wage notices or statements. (*Id.* ¶¶ 201-02.) According to Plaintiff, "many similarly situated current and former employees" were subjected to Defendants' "systematic, widespread, repeated, and consistent" conduct. (*Id.* ¶¶ 174-75.)

---

[1] The following allegations are taken from the Second Amended Complaint except where otherwise indicated, and accepted as true for the purpose of this Motion only. *See LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 475 (2d Cir. 2009).

Plaintiff filed this action on December 6, 2016, subsequently amending the Complaint twice and moving to certify the case as a collective action. (*See* Dkts. 1, 25, 29, 40.) The Second Amended Complaint asserts his claims individually and on behalf of Defendants' "current and former Retail Employees, Warehouse Workers, and Drivers." (SAC ¶ 20.) While several opt-in plaintiffs have joined the action, they were not named in the Second Amended Complaint.

On May 18, 2017, RKIC requested a pre-motion conference regarding this Motion, and the conference and Motion were referred to the undersigned for a report and recommendation. (*See* Dkt. 36; May 19, 2017 Order.) The undersigned held a pre-motion conference on June 1, 2017, set a briefing schedule on the Motion, and adjourned *sine die* a previously scheduled hearing on Plaintiff's Motion to Certify Collective Action pending the resolution of RKIC's Motion to Dismiss. (*See* June 1, 2017 Mins.) On September 14, 2017, the undersigned heard argument on the Motion. (*See* September 14, 2017 Mins. and Hr'g Tr.)

DISCUSSION

I. Legal Standard

RKIC seeks to dismiss the claims brought against it, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that Plaintiff has not alleged an employment relationship with RKIC justifying its inclusion as a Defendant. The parties agree that Plaintiff did not work directly for RKIC.[2] However, they dispute whether Plaintiff has sufficiently alleged that RKIC could nevertheless be considered Plaintiff's employer under either the "single integrated enterprise" or "joint employer" test.[3] (*See* Pl. Opp'n Mem. at 2, Dkt. 44; September 14, 2017 Hr'g Tr. at 4-5.)

---

[2] Plaintiff noted at oral argument that while several opt-in plaintiffs primarily worked at Defendants' retail and manufacturing locations, they "were called to work at" RKIC on occasion. (September 14, 2017 Hr'g Tr. at 15-16.)

[3] RKIC also refers to "'single employer' tests" in its papers. (*See* RKIC Mem. at 6, Dkt. 43.) Because courts distinguish between the "single integrated enterprise" and "joint employer" tests, the Court uses those terms rather than the term "single employer test" here for the sake of clarity.

To survive a motion to dismiss for failure to state a claim, a plaintiff's allegations must be supported by "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court accepts as true "all allegations in the complaint" and "draw[s] all inferences in the non-moving party's favor." *LaFaro*, 570 F.3d at 475 (internal citation omitted). Nonetheless, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. The Court considers the plausibility of plaintiff's allegations in context by "draw[ing] on its judicial experience and common sense." *Id.* at 679.

The single integrated enterprise test assesses whether nominally "separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a single employer." *Mendez v. Pure Foods Mgmt. Grp.*, No. 3:14-CV-1515 (SRU), 2016 WL 183473, at *2 (D. Conn. Jan. 14, 2016) (quoting *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985)). The joint employer test determines whether "separate legal entities . . . handle certain aspects of their employer-employee relationships jointly." *Id.* at *3. Despite these differences, both tests are "centered on the alleged employer's control over the nominally separate entity and its employees." *Id.* A single integrated enterprise exists where employers share "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *Apolinar v. R.J. 49 REST., LLC*, No. 15-CV-8655 (KBF), 2016 WL 2903278, at *4 (S.D.N.Y. May 18, 2016) (citation omitted). The joint employer test focuses on control over labor, asking whether multiple employers together "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Mendez*, 2016 WL 183473, at *3 (citing *Carter v. Dutchess Comty. College*, 735 F.2d 8, 12 (2d Cir. 1984)). The Court may also consider "any other factors it deems relevant to its assessment of the economic realities," including those that "indicate that an entity has functional control over workers even in the absence of [ ] formal control" over workers. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003); *see also Teri v. Spinelli*, 980 F. Supp. 2d 366, 375 (E.D.N.Y. 2013) (finding joint employer relationship even where defendant employer did not hire and fire joint employees, determine their compensation rates, or set or enforce workplace policies).

Because Plaintiff argues that the allegations in the Second Amended Complaint are sufficient to meet the single integrated enterprise and joint employer tests, the undersigned takes both analyses into account here. (*See* Pl. Opp'n Mem. at 3, 7.)

II. Analysis

RKIC concedes that Plaintiff has supported his claims with some factual allegations, specifically that Defendants

> (i) share some common ownership (¶ 2) and corporate office locations (¶ 34);
> (ii) that the retail eateries sell ice-cream manufactured by RKIC (¶ 33);
> (iii) that RKIC operates a website identifying the retail eatery locations that carry the ice cream products that it manufactures (¶ 5); and
> (iv) that RKIC's logo appears on its website and in or around locations that sell its ice-cream products (¶¶ 6-8).

(RKIC Reply Mem. at 5, Dkt. 45.) RKIC argues that these factual allegations are insufficient, however, and that the Second Amended Complaint otherwise invokes "bald legal conclusions (untethered from animating facts)." (RKIC Mem. at 6, Dkt. 43.) For example, RKIC contends that where Plaintiff alleges the Defendants used shared letterhead, he must allege "[t]hat I, the plaintiff, know that they did this because I was part of it, I was there," or else such an allegation is a mere conclusion. (September 14, 2017 Hr'g Tr. at 29-30.) RKIC also questions the plausibility of the Second Amended Complaint, contesting whether the names of the Entity Defendants do, in fact, all appear on employee pay stubs as Plaintiff alleges. (*Id.* at 12-13, 30-34.)

The undersigned finds that the Second Amended Complaint sufficiently alleges RKIC's employment relationship to the other Defendants and to Plaintiff. In addition to the allegations identified by RKIC, Plaintiff asserts that the Retailers and RKIC share "the common purpose of manufacturing, distributing, and selling kosher ice cream to the public on a retail and wholesale basis."[4] (SAC ¶ 31.) This is supported by the fact that the Retailers exclusively sell RKIC's ice cream and the Entity Defendants' websites are mutually linked. (*Id.* ¶¶ 4, 5, 31-33, 35.) The connection between RKIC and the Retailers is bolstered by a shared logo, consisting of a red ellipse with the words "KLEIN's Real Kosher" arranged around Hebrew letters, which is posted on the entrance of RKIC, on the side of its trucks, and inside each of the Retailers' locations. (*Id.* ¶¶ 6-8.)

Plaintiff also asserts that the Entity Defendants operate under the common ownership and management of the Individual Defendants, all members of the Klein Family. The Second Amended Complaint does state in a conclusory manner that the Individual Defendants exercise "the power to fire and hire employees, supervise and control employee work schedules and conditions of employment, and determine the rate and method of compensation of employees," thereby reciting the elements of the joint employer test. (*Id.* ¶ 40.) But Plaintiff supports this conclusory statement with factual allegations that the Individual Defendants "consider and resolve payroll, scheduling, and human resource issues for all of the Entity Defendants," including "assigning employees shifts, mode and methods of payment, and employment locations." (*Id.* ¶ 36.) In addition, Plaintiff alleges that: Defendants share and exchange funds, income, and employees as needed; the names of all of the Entity Defendants appear on employee pay stubs; and RKIC uses "the same employee manuals, company letterhead, and payroll operations" as the other Entity Defendants. (*Id.* ¶¶ 9, 37-39, 44, 55, 66, 77, 88; Pl. Opp'n Mem. at 4-7.) These factual allegations support the argument that the Individual Defendants jointly operate the Entity Defendants, including RKIC, in pursuit of a common purpose.

[4] Plaintiff does not address whether the allegations acknowledged by RKIC are sufficient on their own to meet the pleading standard.

Allegations such as common names, marketing, "the use of the same employees at multiple locations," "use of the same central payroll office," and "the distribution of common employee guidelines and procedures" point to a single integrated enterprise. *See Flores v. 201 West 103 Corp.*, No. 16-CV-2233 (KPF), 2017 WL 2589382, at *7 (S.D.N.Y. June 4, 2017) (defendants shared advertising, website, and a common theme, ownership and operations). The Entity Defendants are allegedly owned and managed by the same individuals, who implement employment policies across locations, operating out of shared offices. *See Chimbay v. Pizza Plus at Staten Island Ferry, Inc.*, No. 15-CV-2000 (RLE), 2016 WL 1064611, at *4 (S.D.N.Y. March 14, 2016). Plaintiff describes the Individual Defendants' shared functional control of the Entity Defendants' labor force and financial resources. *Cf. Apolinar*, 2016 WL 2903278, at *4 (defendant did not share operations or centralized control of labor relations with plaintiffs' corporate employer). The relationship alleged between Defendants goes beyond a superficial appearance of common management. *Cf. Cannon v. Douglas Elliman, LLC*, No. 06-CV-7092 (NRB), 2007 WL 4358456, at *4 (S.D.N.Y. Dec. 10, 2007) (no single integrated enterprise where real estate agents entered joint venture and shared sales office); *Wolman v. Catholic Health Sys. of Long Island, Inc.*, 853 F. Supp. 2d 290, 298 (E.D.N.Y. 2012) (no single integrated enterprise despite joint venture).

In evaluating employer status on a motion to dismiss, the Court should be "mindful of the fact-intensive nature of the joint-employer inquiry," and focus on whether a plaintiff has "pleaded sufficient facts to allow claims to proceed against" the defendants. *Jianjun Chen v. 2425 Broadway Chao Rest. LLC*, No. 16-CV-5735 (GHW), 2017 WL 2600051, at *7 (S.D.N.Y. June 15, 2017); *see also Brown v. Daikin Am. Inc.*, 756 F.3d 219, 226 (2d Cir. 2014) ("Whether two related entities are sufficiently integrated to be treated as a single employer is generally a question of fact not suitable to resolution on a motion to dismiss."). "[T]he relevant inquiry is whether a [particular] defendant has been put on notice of the theory of employer liability." *Flores*, 2017 WL 2589382, at *6 (citation omitted). RKIC seeks to contest the accuracy of the facts alleged, an analysis not suitable on a motion to dismiss. For example, it focuses on whether the names of the Entity Defendants actually appear on employee pay stubs.[5] Plaintiff's allegations are not contradictory to the point of implausibility. *Cf. Peng Bai v. Zhuo*, No. 13-CV-5790 (ILG)(SMG), 2014 WL 2645119, at *3 (E.D.N.Y. June 13, 2014) (allegation that restaurant was operated by six corporations conflicted with allegation of sole proprietorship).

Plaintiff has met the pleading standard with respect to RKIC's employer status. Accordingly, the undersigned respectfully recommends that the Motion to Dismiss be denied.

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends that the Motion to Dismiss be denied. Any objection to this Report must be filed in writing with the Clerk of Court within fourteen (14) days of service. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Failure to timely file any such objection waives the right to appeal the District Court's Order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

SO ORDERED:

Peggy Kuo

PEGGY KUO
United States Magistrate Judge

Dated: Brooklyn, New York
October 17, 2017

[5] In any event, the Court has no basis to consider this question because no pay stubs were attached to the Second Amended Complaint.